

Something Old & Something New:

Implications of the Bankruptcy Code and the New Bankruptcy Act on Your Construction Law Practice

HBA Construction Law Section
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SCOPE OF PRESENTATION

This presentation is intended for the construction law practitioner who, with little bankruptcy experience, represents a client that finds himself a creditor in a bankruptcy proceeding. The author presumes (and certainly hopes) that if your construction client requires the benefits of bankruptcy, you will enlist an experienced debtor counsel to assist your client.

The objective of the first part of this presentation is to share some practical tips concerning bankruptcy practice and procedure in the areas of bankruptcy law most frequently confronted by non-bankruptcy practitioners representing construction clients. While there will be some discussion of substantive bankruptcy law in this section, that is not the primary focus of this presentation.

The second part of this presentation will address some substantive law highlights concerning preference claims, construction contracts, and contract proceeds as impacted by a bankruptcy filing.

The third part of this presentation shall be a brief overview of some selected amendments to bankruptcy law under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

The final part of this presentation shall consist of a very brief and general discussion of how the new bankruptcy law came about and how it is perceived.

I. YOU DON'T NEED TO CONSULT BANKRUPTCY COUNSEL . . . OR DO YOU?

Hypothetical (A): You are a seasoned, capable and highly regarded construction lawyer with experience in both arbitrations and trials in state district court. Your general contractor client advises you that an owner of one of the small projects your client is working just filed Chapter 13 bankruptcy. Your client is livid because she was suspicious of the debtor's financial capabilities from the very beginning and insisted on being provided a financial statement - which now has proven to be false - before signing the construction contract. You remember having been remotely involved in a Chapter 7 bankruptcy in which an exception to discharge adversary complaint was successfully prosecuted against a debtor because the debtor provided a false financial statement. After providing your client assurances that her claims will not be discharged, you locate a copy of the prior complaint to determine exception to discharge from the Chapter 7 case, modify it slightly to incorporate the names and facts from this Chapter 13 case, then file and serve it.

As required by the bankruptcy clerk's office, you also served a notice of the pretrial conference which instructs all parties to conduct a Federal Rule 26 conference and prepare a Joint Case Management and Discovery Plan. Several days later, you receive a message that your opposing counsel has called and wants to talk to you about "a Rule 11". You are both excited and relieved because you are a non-bankruptcy practitioner and you know that your opposing counsel is an experienced bankruptcy lawyer but he is talking about "a Rule 11" and in

your state court practice that means **AGREEMENT**. When you return the call to discuss the **AGREEMENT**, you soon learn that the Rule 11 your opponent wants to discuss is the Federal Rule 11 and that means **SANCTIONS**. He wants to know how your claims and other legal contentions set forth in your adversary complaint are “warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law” when it is clear under The Bankruptcy Code and well-established authority that there is no exception to discharge in Chapter 13 for a debt incurred based upon a creditor’s reliance on a fraudulent financial statement.¹ Oops!

Within just the last several years, the Southern District of Texas led the entire nation in imposition of Rule 11 sanctions. Perhaps your “mistake” can be cured by withdrawal of the offending pleading, but your embarrassment with your client will likely not be so easily remedied.

Hypothetical (B): Same client, same debtor as in Hypothetical (A) but this time it is a Chapter 7 bankruptcy with no fraud implications. However, the debtor/owner had been very slow in making payments to your client over the course of the contract work and, just two weeks prior to the bankruptcy filing, had caught up most of the overdue payments to your client. Within just a few days after the bankruptcy filing, your client receives a demand letter from the bankruptcy Trustee advising that the payments received two weeks before the filing constitute voidable preferences under Section 547 of The Bankruptcy Code and demands that they be repaid. You advise your client that you will negotiate with the

Trustee to pay a “nuisance value” to settle the preference claims and if your efforts are not successful, you will refer the matter to a bankruptcy lawyer you know because surely your client should not have to return this honestly earned money. In the meantime, you prepare and file a proof of claim for the remaining amounts owing to your client on the project.

Your efforts to negotiate the preference demand with the Trustee are unsuccessful and soon your client calls and advises he has been served with an adversary complaint. You refer the matter to a bankruptcy specialist, and as you are reviewing the background and facts with him, he advises you that this case is pending before the most debtor-oriented judge in the district and recommends that the first order of business should be to file a demand for jury trial and motion to withdraw the reference based upon right to jury trial, in order to get the case out of that judge’s court. You agree, but ... oops! You filed a proof of claim in the bankruptcy which constitutes a “consent to jurisdiction” of the bankruptcy court and serves to defeat a motion to withdraw the reference and your right to jury trial.

Could this or a similar fact scenario occur? Absolutely! Does it occur? Frequently!

Hypothetical (A) is perhaps silly. Hypothetical (B) is certainly serious. These are just two examples of traps for the unwary and uninitiated trying to practice in bankruptcy court. Set forth below are several examples of “issues” that may arise and confront the non-bankruptcy practitioner, along with practical advice.

¹ This has changed since the new Act took effect October 17, 2005.

(A) PROOFS OF CLAIM

A proof of claim can in some respects be analogized to a creditor's ticket for admission to the bankruptcy proceeding. The general rule is no late admission will be allowed. That is, with very limited exception, if you fail to timely file your proof of claim, you and your client, as an unsecured creditor, will probably lack standing to participate in the bankruptcy proceeding and in a distribution after the bar date. Exceptions do exist and they include:

- Chapter 11 cases where the claim has been accurately scheduled by the debtor and is not listed as unliquidated or disputed and neither the disclosure statement nor plan provide independently for a claims bar deadline, and the clerk's office has not established such a deadline;
- where you seek and receive leave to file a late claim; or
- where the time for filing your claim is "enlarged" as the result of a motion you have filed.

Timely filing of a claim is essential because, under The Bankruptcy Act, a late-filed claim is subordinated entirely to timely filed claims, and receives a distribution only after all timely filed claims are paid in full. *See, e.g.,* 11 U.S.C. §§ 726(a) and 502(b)(9); *See also In re Wilson*, 96 B.R. 257, 262 (9th Cir. 1988). Full payment of all claims is rare in bankruptcy. The general rule is that proofs of claim, in Chapter 7 and Chapter 13 cases, must be filed within 90 days of the date set for the first meeting of creditors. Fed.R.Bankr.P. 3002(c).

A motion to enlarge time for filing a claim may be granted if the creditor can

establish "excusable neglect", but that standard is difficult to satisfy and is defined differently by the different circuits. It is helpful to have a working history with both debtor's counsel and the bankruptcy Trustee if you are seeking enlargement of time, for you may be able to procure either their agreement with your motion or agreement they will not oppose your motion. If you are successful in obtaining an enlargement of time, your claim will be treated the same as other creditors in your class.

If your client is sued by a debtor or Trustee to recover a voidable preference or fraudulent transfer, your client is entitled to file a proof of claim for any amount it is required to pay back. The claim must be filed within 30 days of the date of the judgment against your client. Fed.R.Bankr.P. 3002(c)(3).

Should you rush to file your proof of claim as early as possible to ensure you do not miss the bar date? Not until you have thoroughly analyzed your client's position in the bankruptcy and the likelihood that it will be made a party to a preference action or other proceeding in the bankruptcy court. If there is a likelihood your client will be a preference defendant, a party in an action removed from state court to bankruptcy court or otherwise named a defendant in an adversary proceeding, you need to evaluate the availability and desirability of removing the case from the bankruptcy court and having it tried to a jury in the federal district court. As shown in Hypothetical (B) above, the filing of a proof of claim serves as a consent to the jurisdiction of the bankruptcy court and will in all probability deprive your client of the right to remove the case to federal court and try the case to a jury.

What do you do if you are approaching your claims bar deadline and you know that at least a prospect exists that your client will be a party to a proceeding in which it does not wish to consent to bankruptcy court jurisdiction? You would be best served to consult an experienced bankruptcy practitioner. While the Ninth Circuit has held that where a creditor has acted diligently and aggressively opposed bankruptcy court jurisdiction, the mandatory filing of its claim by the bar deadline does not constitute consent to jurisdiction, there is no similar authority from the other circuits. *See In re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1986); *But cf In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702 (2d Cir. 1995)(rejecting argument that filing proof of claim under protest in order to avoid losing rights does not constitute consent to jurisdiction).

(B) AUTOMATIC STAY

The automatic stay is probably the most commonly known aspect of current bankruptcy law but far more complex and diversely interpreted than most would imagine. We all know that generally, Section 362 provides that a bankruptcy petition operates as a stay of the commencement or continuation, including the issuance or use of process, in a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case, or to recover a claim against the debtor that arose before the commencement of the bankruptcy case. *See* 11 U.S.C. § 362(a)(1). Perhaps less commonly known is that the Section also prohibits acts to exercise control or the continued exercise of control over property of the estate, which could include a subcontractor's tools, or materials that a

general contractor or owner would otherwise, under the terms of the contract, be entitled to possess or control. Moreover, Section 362 has also been interpreted to restrict or prohibit certain acts involving a debtor that arose exclusively post-petition; that is, after the filing of the bankruptcy. *See, e.g., In re Bottone*, 226 B.R. 290 (Bankr.D.Mass. 1998).

Logically, the first step in analyzing the implications of the automatic stay as pertains to your client's rights is to determine whether the stay even applies. For example, an exception to the automatic stay exists to allow perfection of a mechanic's lien that relates back, or has its inception prior to the filing of the bankruptcy. Similarly, the Fifth Circuit has held the automatic stay does not apply to restrict or prohibit recoupment (which requires mutuality of transaction) but it generally does apply to offset. Also, note that the automatic stay does not prevent a subcontractor to a debtor general contractor from filing a lien against a non-debtor owner's property. **CAVEAT:** Please recognize the practical reality that most bankruptcy judges jealously guard and protect their jurisdiction and authority, and view with extreme displeasure what they perceive to be disregard for their jurisdiction and authority. If any question whatsoever exists concerning whether the stay applies to your situation, you will be well served to defer to bankruptcy court jurisdiction. Damages may be assessed for willful and even good faith violations of the stay (11 U.S.C. § 362(k)), and counsel's vigorous defense of a client's alleged violation may or may not be successful.

The preparation and filing of a motion for relief from stay is the area that seems to attract more participation by non-bankruptcy lawyers than any other. It is also one of the

most highly structured and regulated procedures, by local rule. Any attorney wishing to file a motion for relief from stay in the Southern District of Texas Bankruptcy Courts should be familiar with our Local Rule 4001 and assure full compliance with the rule. Attached as Appendix A is a copy of the relevant local rule. Our procedure requires completion of specific forms which are available from the bankruptcy clerk's office. Failure to utilize the proper forms will result in the motion being declined by the clerk's office. Failure to comply with other requirements of the local rule may result, depending upon the judge, in dismissal of the motion or refusal to grant the relief requested, even if the debtor fails to respond. Proof of the required service is essential before the court will grant the relief requested and, on default orders (where the debtor fails to respond) a certification by counsel for the Movant that Movant has complied with the requirements of Local Rule 4001 is required by most judges. In cases where there is a Trustee -and trustees are notorious for not responding to Motions for Relief From Stay- it is helpful for counsel to be able to represent to the court that the Trustee was consulted and has no objection to the motion or does not take a position, one way or another, concerning the motion. A recitation to that effect in a default order is helpful.

Significantly, please note the bankruptcy judges in the Southern District of Texas are currently revising the rules, procedures, and developing forms for motion for relief from stay practice. These procedures and forms will be mandatory once adopted.

Finally, keep in mind a hearing on a contested motion for relief from stay is really a trial, requiring exhibit lists, exhibits and evidence. Though the hearing will be set by

the clerk's office for a specific date and time, when a large docket of motions for relief from stay will be set, actual dates and times for the evidentiary hearing will be determined by the court's schedule. The Movant must be prepared, however, to proceed on the date and at the time specified in the notice.

(C) CO-DEBTOR STAY

Two chapters of The Bankruptcy Act provide for the extension of the automatic stay beyond application to only the debtor. Both Chapter 12, the family farmer bankruptcy chapter and Chapter 13, the wage earner chapter include stays for the benefit of a "co-debtor". These co-debtor stay provisions extend certain protections to co-signors, guarantors and others that may be jointly liable on a debt with a debtor in bankruptcy. These provisions may be relevant to your representation of a construction client that may hold a personal guarantee of a non-debtor or that holds a General Indemnity Agreement it wishes to enforce. From a practical standpoint, it is most likely that the GIA will be executed in connection with a corporate contractor/principal, and such corporate entity is not eligible to be a debtor in a Chapter 12 or Chapter 13 case. Rather, the corporate entity would have to file a Chapter 7 or Chapter 11 proceeding, and neither of those chapters contain any automatic co-debtor stay provisions. Moreover, these co-debtor stay provisions typically apply to consumer debts.

The procedure for obtaining relief from the co-debtor stay under Chapter 12 or Chapter 13 is not the same as obtaining relief of the automatic stay under Section 362. In fact, it is easier and does not involve quite the hyper-technical practice and pleading requirements as Local Rule 4001 imposes in

connection with a motion to modify the Section 362 automatic stay. Frequently, however, the motion for relief from a co-debtor stay is combined with a motion for relief from the automatic stay as against the debtor to allow the creditor to proceed against both entities. In that case, compliance with Local Rule 4001 (pertaining to motions for relief from the Section 362) generally satisfies the requirements relating to the co-debtor stay, as well.

(D) IN REM ORDERS

If your involvement in bankruptcy matters is only incidental to your construction law practice, then it is not likely you will encounter many repeat-filing debtors. In the early years of the Bankruptcy Reform Act (our bankruptcy law until October 17, 2005) repeat filing by desperate debtors was a serious problem. A creditor would file a motion for relief from stay, the debtor would be advised by its counsel that there was no legitimate defense available to the motion, and either before the creditor's motion was granted or after the motion was granted but before a foreclosure could occur, the debtor would dismiss his bankruptcy and file a new bankruptcy, resulting in a "new" automatic stay. Congress first responded to this problem by legislating a mandatory 180 day waiting period for refiling under circumstances where the case was dismissed because of the debtor's willful failure to abide by orders of the court or in cases where the debtor requested and obtained voluntary dismissal of the case following the filing of a motion for relief from stay. *See* 11 U.S.C. § 109(g). The ever-imaginative debtor (or debtor's counsel), not to be deterred by U.S. Congress then created a trend of transferring the property made the basis of the creditor's motion for relief from stay from one entity to another entity, with the entities continually

filing bankruptcy. Through this mechanism which resembles the game of "keep away" that many of us played as children, the debtor managed to at least delay foreclosure of the property.

Creditor's counsel can be at least as innovative as debtor's counsel, and manifested this imagination in developing the "*in rem*" order terminating the automatic stay. The order terminates the automatic stay in favor of one or more creditors in connection with a certain property, which is described in detail in the order. The order further provides that a bankruptcy filing of any of the owners or co-owners of the property will not create an automatic stay relating to the specifically described property, for a period of 180 days, and further prohibits the owners, directly or indirectly, from transferring, selling or otherwise conveying any interest in the property. Once the order is signed, it is then recorded in the real property records of the county where the property is located.

If you should encounter a situation of either repeat filing by a debtor or a situation where parties are playing "hide and seek" with a property by transferring ownership and placing various owners in bankruptcy, the "*in rem*" order may be your answer. The concept was not uniformly accepted by all bankruptcy judges but the author has experienced success in obtaining *in rem* orders from certain judges in the Southern District of Texas. As will be discussed briefly below, provisions of the new Bankruptcy Act address this issue.

(E) POST-PETITION FINANCING

Post-petition financing, also known as post-petition lending, is one of the most highly regulated and strictly scrutinized

activities in bankruptcy. *See* 11 U.S.C. § 364. Full disclosure and advance approval is absolutely essential, and a creditor that ventures into this area of bankruptcy practice without crossing all t's and dotting all i's may quickly find himself in substantial jeopardy. It is rare that a creditor that extends post-petition credit without full disclosure and advance approval from the court receives full repayment of the post-petition financing, although full repayment may be likely or even probable if advance approval is obtained.

Most of your clients are not in the business of lending, and certainly not in the business of high-risk lending. However, financial arrangements and activities that might otherwise be commonplace between your client and others outside of bankruptcy should not be assumed to be acceptable in bankruptcy. For example, advancing funds not yet due to a debtor/subcontractor but necessary to allow the subcontractor to make payroll and keep laborers on the job may constitute post-petition lending. If your client's contract has appropriate wording, or if your client resides in a jurisdiction that recognizes certain rights of recoupment and setoff, ultimately your client may be able to recover the payroll advance. However, if the Chapter 11 case of the debtor/subcontractor should convert to Chapter 7 before your advance is repaid and you do not have an order authorizing the advance, there certainly is the prospect the Chapter 7 Trustee will challenge the advance (and your claim to repayment of the advance) as being an unauthorized and therefore unlawful post-petition lending transaction.

While the author does not suggest that every payment of a debtor/subcontractor's obligations will be interpreted as a lending transaction, some transactions will be so

interpreted and therefore deserve scrutiny and analysis before funds are advanced. There are very specific and detailed requirements associated with seeking and obtaining authority to engage in post-petition financing for a debtor, and caution should be exercised in assuring compliance with the requirements if there is a likelihood or even prospect that the transaction will be interpreted by a bankruptcy Trustee or Judge to constitute post-petition lending.

(F) EXECUTORY CONTRACTS

Most construction contracts will fall within the definition of "Executory Contract" as contemplated by Section 365 of The Bankruptcy Act. An executory contract is defined, for bankruptcy purposes, as a contract under which the obligations of both debtor and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach of the contract. *See* Vern Countryman, *Executory Contracts in Bankruptcy*, 58 MINN. L. REV. 439, 479 (1974). The Bankruptcy Act gives the debtor or Trustee the right to assume or reject any executory contract. In a Chapter 7 case, the Trustee must make the election to assume or reject within 60 days after the filing of the bankruptcy, otherwise the contract is deemed rejected. However, the time period for assuming or rejecting a construction contract in a Chapter 11 case extends until the time the Chapter 11 plan is confirmed.

If your client is a party to an executory contract and does not know whether the Chapter 11 debtor intends to assume or reject, then you can ask the court to compel the debtor to make the election by filing a motion to compel the debtor to assume or reject the executory contract. Not only will this assist your client in learning whether it

needs to seek a replacement contractor/subcontractor, but in the event the debtor wishes to assume the contract, this procedure should expedite the curing of defaults under the contract. Under The Bankruptcy Act, in order for a debtor or Trustee to assume an executory contract, it needs to cure existing defaults or provide adequate assurance of prompt cure of the existing defaults, and provide adequate assurance of future performance under the contract. *See* 11 U.S.C. § 365(b)(1).

(G) MISCELLANEOUS CONSIDERATIONS

(i) Familiarize yourself with local rules

If you are going to represent your client in bankruptcy court in connection with any matter, you would be well served to familiarize yourself with the local rules for the Bankruptcy Courts for the Southern District of Texas and the local rules for the Federal District Courts for the Southern District of Texas. Both sets of local rules govern practice before the local bankruptcy courts here. If you are going to actually file any motion or appear in any contested proceeding in bankruptcy court, it is imperative you familiarize yourself with the local rules. In my experience, bankruptcy judges tend to be somewhat less forgiving of rule violations and mistakes by counsel than state court judges. You do not wish your client's substantive rights to be jeopardized by your lack of familiarity with the rules that govern your practice in bankruptcy court.

(ii) General philosophy of bankruptcy

In representing your client in connection with any bankruptcy-related matter and evaluating your course of action, it is helpful to keep in mind that consistent themes

throughout The Bankruptcy Act and all its chapters and the Federal Bankruptcy Rules require (a) openness in connection with dealings with the debtor (b) full disclosure in connection with transactions and dealings involving the debtor, and (c) advance approval of transactions involving the debtor's finances and/or property. Bankruptcy lawyers have been denied substantial fees because of failure to disclose relationships with the debtor, its affiliates or creditors. Debtors have been indicted and convicted of federal bankruptcy crimes for failure to disclose transactions and assets. Creditors have been ordered to pay monetary sanctions for taking certain actions concerning debtors, debtor's estates, or property of debtors or their estates without advance authorization.

(iii) Meeting of Creditors

If your client has any financial stake whatsoever in a pending bankruptcy, you should take advantage of the meeting of creditors to obtain some "free discovery". While the discovery will not be in depth or exhaustive, it will give you the opportunity to ask questions of the debtor and debtor's counsel, and to the extent there is a Trustee involved, to educate the Trustee in connection with concerns or special interests your client might have. For example, if your client has an executory contract with the debtor, you can utilize the meeting of creditors to inquire of the debtor, while its representative is under oath, whether it intends to assume or reject the contract. Moreover, there will likely be other creditors in attendance with questions that may result in some useful information to benefit your client.

(iv) Notice of Appearance and Request for Notices

If your client has an interest in a bankruptcy proceeding then you can often remain apprised of the status of the proceeding by having your name and address added to the service list. You may be added to the service list by filing a pleading asking that your name be added to the service list and serving that pleading on everybody in the bankruptcy. Different attorneys use different forms of notice, but most have the same effect. Attached as Appendix B is the form the author utilizes, which is entitled “Notice of Appearance and Request for Notices”. Once the notice is filed and properly served, you should be able to stay generally updated concerning the status of the case as a result of the mailings and notices you receive.

RECOMMENDATION

Perhaps the most pragmatic advice the author can give the non-bankruptcy practitioner in representing its construction clients in a bankruptcy proceeding is to keep handy the name and telephone number of a bankruptcy practitioner. Consultation with an experienced bankruptcy practitioner should help, in the first instance, in your determination of whether you need to retain bankruptcy counsel for your client or whether you can adequately represent the client’s interest. Should you elect to undertake your client’s representation in bankruptcy court, you should be self-conscious about analyzing the not-so-obvious implications (or complications!) of instruments you file, claims you assert and transactions your client engages in with the debtor. As illustrated above, activities that seem simple and commonplace can have far reaching and unanticipated implications in this wonderland known as bankruptcy.

**II.
ISSUES RELATING TO PREFERENCE
CLAIMS, CONSTRUCTION
CONTRACTS AND CONTRACT
PROCEEDS**

(A) PREFERENCES

It is rare to find anyone in the chain of construction contractors and suppliers that has not been the recipient of a demand letter from a bankruptcy Trustee seeking repayment of an amount alleged to be a voidable preference. The cost of defending a preference claim in an adversary proceeding can be substantial, and therefore the nature and viability of available defenses should be evaluated – and shared with the bankruptcy Trustee – very early on. Before addressing defenses to a preference claim, however, we should consider steps that might be taken to avoid, or at least minimize, the likelihood of having a preference claim made.

Generally speaking, and excluding “insider” issues, a voidable preference is a *transfer of an interest of the debtor in property (or money) to or for the benefit of a creditor, on account of an antecedent debt owed by the debtor to the creditor before the transfer was made, made while the debtor was insolvent, made on or within 90 days before the date of the filing of the bankruptcy petition, which transfer enabled the creditor to receive more than it would have received in a case under Chapter 7 of The Bankruptcy Act, if the transfer had not been made, and if that creditor had simply received a distribution through the bankruptcy estate in the Chapter 7 case. See 11 U.S.C. § 547(b).*

(i) How to Avoid the Preference Trap

- Can you obtain collateral or look to a bond claim or mechanic's lien to secure payment of your claim? These methods of assuring payment may help you avoid being the target of a preference claim because, with these options available to you for collection of the debt, you did not then receive more by the debtor's payment than you would have received if the debtor had not made the payment and the case were administered under Chapter 7. You would still receive 100% of your claim either from liquidation of collateral pledged by the debtor or from your bond claim or mechanic's lien.

- Obtain a guarantee of payment from a principal or some other third party, if possible. While this may not prevent a Trustee or debtor in possession from seeking recovery of what might otherwise be a voidable preference payment, you at least have recourse to recover any amount you have to repay the debtor or the Trustee.

- Be certain any release of mechanic's liens your client executes in exchange for payment specifically provides *the release is given in consideration of payment in good funds* and is expressly conditioned upon *payment in good funds*. Generally, a release of a valid lien (such as a mechanic's lien) in exchange for payment constitutes "a contemporaneous exchange for new value given to the debtor" which is a complete defense to a preference claim. However, the 9th Circuit has held that there was no contemporaneous exchange for new value when the general contractor issued a cashier's check to replace an earlier insufficient funds check given to the subcontractor/creditor in exchange for the release of its mechanic's lien. *In re JWJ Contracting Co., Inc.*, 371 F.3d 1079 (9th

Cir. 2004). The court acknowledged that the mechanic's lien release was a contemporaneous exchange for new value in return for the initial check. However, that initial check was returned for insufficient funds and, by the time the cashier's check was issued and exchanged, the mechanic's lien had long since been released and there was no new value given by the creditor in exchange for the subsequent cashier's check. The court observed the unconditional lien release given by the subcontractor/ creditor had transformed the pre-existing debt from secured to unsecured. *Id.* at 1082. The message here is the lien release should be conditioned upon actual payment in good funds, in order to avoid a preference claim if the customer's check is returned NSF and subsequently replaced.

- The law has changed significantly over the past few years in the area of "critical vendor" payments to unsecured creditors in Chapter 11 bankruptcy cases. Previously, it was relatively common for the bankruptcy court to approve a first day order authorizing payment of pre-petition unsecured claims of critical vendors. The Bankruptcy Act generally prohibits payment of pre-petition debts without court order or a confirmed plan of reorganization, so debtors would routinely seek an order from the court to allow payment of pre-petition debt on the assumed basis the payments were necessary for continued business relationships with these vendors. In the K-Mart case in the 7th Circuit, the bankruptcy court authorized \$300 million in payments of such pre-petition claims, and a "non-critical" vendor appealed the bankruptcy court's authorization of the payment. The federal district court, as the first level of appeals court, reversed the bankruptcy judge's authorization and the 7th Circuit Court of Appeals affirmed the district court's reversal of the critical vendor order.

In re K-Mart Corp., 359 F.3d 866 (7th Cir. 2004). Those critical vendor payments, without the protection of a court order authorizing such payments, became targets for recovery as voidable preferences under Section 547 and unauthorized post-petition payments under Section 549 of The Bankruptcy Code. The 7th Circuit Court of Appeals did not say there could never be legitimate critical vendor payments but established some onerous criteria that a debtor would have to satisfy before being entitled to make critical vendor payments.

- As a general proposition, there is some appeal and benefit from the “bird in the hand” philosophy on accepting a payment that may well be challenged as a voidable preference. The client needs to be forewarned, however, of the vulnerability of the payment to an avoidance claim to avoid a rude awakening when that demand letter from the Trustee arrives.

(ii) Defenses To The Preference Claim

Despite your best efforts you may not always be able to avoid finding yourself (or your client) the recipient of a preference demand letter. It is not unusual for a bankruptcy Trustee or a Committee that has been assigned all preference claims through a confirmed Plan of Reorganization to simply issue preference demand letters to any creditor that received payment within 90 days before the bankruptcy filing. Some preference claims are defensible, and the new Bankruptcy Act added some additional defenses.

- Payments that were made/received in the “ordinary course of business” between the debtor and the creditor are generally defensible. *See* 11 U.S.C. § 547(c)(2). Prior to October 7, 2005, the creditor had to show

the payment was made according to the ordinary course of business between the debtor and the creditor and according to ordinary business terms in the industry. Under the new Bankruptcy Act the “and” has become an “or” (*Id.* at (c)(2)(A) and (B)) greatly simplifying that defense and vastly increasing the availability of that defense for creditors.

- If, after receipt of the challenged payment/transfer the creditor provided additional, unsecured credit, and that additional credit has not been repaid, the creditor can assert the “subsequent new value” defense to the extent of the amount of the additional credit extended that has not been repaid. *See* 11 U.S.C. § 547(c)(4).

- The philosophy behind the preference section of The Bankruptcy Code and Bankruptcy Act is to prevent debtors from “preferring” certain creditors by paying off delinquent or “stale” claims in anticipation of the bankruptcy filing. The preference claim is likely defensible if there was a contemporaneous exchange for new value provided by the creditor in exchange for the payment/transfer by the debtor. *See* 11 U.S.C. § 547(c)(1).

- It is important to analyze the elements of what constitutes a voidable preference then determine if one of or more of those elements is missing in the fact situation alleged. For example, while it is not typical, I have been involved in cases where the alleged preference was in payment of a debt owed by a third party. Under those circumstances, the debtor could not show the payment was on account of an antecedent debt owed by the debtor – because that simply was not the case.

- Another element to closely review is whether the transfers/payment allowed your

client to receive more than it would have received in a straight Chapter 7 liquidation, if the payment had not been made. In many cases, the creditor has released a bond claim or a lien right in exchange for the payment that is later challenged. If the transfer/payment had not been made, the bond claim or lien rights would not have been relinquished and would have served as a basis to assure full payment anyway, of the claim. If the payment/transfer did not allow the creditor to receive more than it would have received under a straight Chapter 7 liquidation, then the payment is defensible.

- In many cases, your client either passed through to subcontractors and suppliers all or a large portion of the payment being challenged. In other words, your client was a “mere conduit” for the payment. Section 550 of The Bankruptcy Act addresses the liability of transferees, such as your client, who is the recipient of a voidable transfer, and case law under both the preference section and Section 550 recognizes the “mere conduit” defense. *See In re Ogden*, 314 F.3d 1190 (10th Cir. 2002). Thus, if your client did not maintain sufficient dominion and control over those funds to the extent it could put them to its own use, then it may employ the “mere conduit” defense. Often, the contract your client signed obligates it to pass through those funds to unpaid subcontractors and suppliers, and perhaps more importantly, the Texas Trust Fund statutes impose potential criminal liability for those who do not do so.

- Under the new Bankruptcy Act, the amount of the transfer must be at least \$5,000 to be voidable. 11 U.S.C. § 547(c)(9). However, this is an affirmative defense and does not prohibit the Trustee from filing suit for smaller amounts. Consequently, in the rare event your client

may be sued for less than \$5,000 in a preference action, you should assert the affirmative defense that the amount in controversy is below the threshold required to be avoidable.

(B) DEALING WITH THE CONSTRUCTION CONTRACT

(i) Exercise of contract rights might violate the automatic stay

The exercise of certain contract rights might be prohibited by the automatic stay if they are deemed to constitute acts against the debtor, debtor’s property or estate, or to have an adverse effect on the estate. By way of example, actions to terminate a debtor’s construction contract are prohibited. *See In re Glover Constr. Co., Inc.*, 30 B.R. 873, 882 n.25 (Bankr.W.D.Ky. 1983). Similarly, acts such as taking possession of a debtor/contractor’s tools and materials, although perhaps authorized under the construction contract, would be a violation of the automatic stay. If the tools and materials had been seized prior to the bankruptcy filing, then the party possessing those items will be considered to be a “custodian” under Section 543 of The Bankruptcy Act and can be compelled by the debtor-in-possession or Trustee to preserve, safeguard and turn over those items for the benefit of the debtor and/or estate. *See* 11 U.S.C. § 543(a) and (b)(1); *See Browning v. Navarro*, 826 F.2d 335, 340 (5th Cir. 1987).

(ii) The Executory Contract

In most cases the construction contract will be an executory contract, as contemplated by Section 365 of The Bankruptcy Act. An executory contract is one under which the obligations of both the debtor and the other party are so far unperformed that the failure of either to

complete performance would constitute a material breach of the contract. *See Vern Countryman, Executory Contracts In Bankruptcy*, 58 MINN. L. REV. 439, 479 (1974). If the contract is an executory contract, The Bankruptcy Act gives the debtor or Trustee the right to assume or reject it. In a Chapter 7 case, the Trustee must make the election to assume or reject within 60 days after the filing of the bankruptcy, otherwise the contract is deemed rejected. However, the time period for assuming or rejecting a construction contract in a Chapter 11 contract extends until the Chapter 11 Plan is confirmed. *See generally United Parcel Services, Inc. v. Weben Industries, Inc.*, 794 F.2d 1005, 1006 (5th Cir. 1986).

(iii) The Terminated Contract

If the contract was actually terminated pre-petition, then it is not an executory contract. *See Moody v. Amacco Oil Co.*, 734 F.2d 1200, 1212 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984). However, if the contract provides that after issuance of the notice of termination the contractor has a certain period of time within which to cure defaults in order to prevent termination, then if the contractor files bankruptcy during that cure period, the contract is not deemed to be terminated pre-petition and is an executory contract under bankruptcy law. *See Deborah S. Griffin, Post-termination Bankruptcy Considerations for the Defaulted Contractor*, 17 Construction Law 24 (1997).

(iv) Assumption of the Contract

In order to assume a contract the debtor or Trustee must cure or provide adequate assurance they will promptly cure existing defaults and provide adequate assurance of future performance under the contract. *See* 11 U.S.C. § 365(b)(1)(A) and (C). In some instances, a surety may be able to block

assumption of a construction contract by arguing that the bonds required under the contract are not assumable under Section 365(c)(2). This provision of The Bankruptcy Act prevents a debtor or Trustee from assuming an executory contract if it is a contract to make a loan or extend other debt financing or financial accommodations to or for the benefit of the debtor, or to issue a security of the debtor. *See* 11 U.S.C. § 365(c)(2).

As noted above, in a Chapter 11 case, the debtor has until the time of confirmation of the Plan to assume or reject the contract. If your client is a party to an executory contract and does not know whether the Chapter 11 debtor intends to assume or reject, your client may not be able to wait indefinitely for the debtor to make the election. You can ask the court, by filing a motion, to compel the debtor to make the election to assume or reject the executory contract. *See Matter of Murexco Petroleum, Inc.*, 15 F.3d 60, 62 (5th Cir. 1994). Not only will this assist your client in learning whether it needs to seek a replacement contractor or subcontractors, but in the event the debtor wishes to assume the contract, this procedure should expedite the curing of defaults under the contract.

(C) DEALING WITH CONTRACT PROCEEDS –ARE THEY OR AREN'T THEY PROPERTY OF THE ESTATE?

(i) Property of the Estate

The term “property of the estate” has a broad definition under bankruptcy law. However, despite the broad definition, a debtor must have either a legal or equitable interest in the property for it to be property of the estate. *See In re Davis*, 253 F.3d 807, 809-10 (5th Cir. 2001). If it is property of

the estate, it is subject to the control and custody of the debtor or Trustee. Whether the debtor has an interest in contract proceeds under a construction contract is often determined by state statute, the construction contract terms, perhaps terms of an agreement with a surety, or a combination of all three.

There are three common arguments made in asserting certain construction proceeds are not property of the estate. First, a claimant may contend it is a beneficiary of a statutory or express trust. The statutory trust obviously would be a creation of the legislature, while an express trust may be created by the construction contract or terms of a surety bond. Second, the claimant may contend the debtor's interest is nothing more than a conduit for payment. Third, the claimant may contend the funds held by the owner are subject to equitable or constructive trusts for the benefit of subcontractors or suppliers. *See In re HLW Enterprises of Texas, Inc.*, 157 B.R. 592, 597 (Bankr. W.D. Tex. 1993).

(ii) Trust Funds

If the contract proceeds are trust funds then, at best, a debtor will have bare legal title to such funds, thereby making them property of the estate, but only as to such legal title. *See, e.g., Georgia Pac. Corp. v. Sigma Service Corp.*, 712 F.2d 962, 964 (5th Cir. 1983). The characterization of contract proceeds as trust funds can result from the existence of a statutory trust, constructive trust, or equitable trust. This characterization of the proceeds as trust funds is most important for down stream contractors or suppliers who have no remaining lien rights. *See Universal Bonding Ins. Co. v. Gittens and Sprinkle Enterprises*, 960 F.2d 366 (3d Cir. 1992).

As noted above, if the funds are trust funds, then the debtor may have legal title to the funds and under Section 541 of The Bankruptcy Code a party holding such funds may have to turn them over to the Trustee or to the estate. *See Stewart v. Law Offices of Dennis Olson*, 93 B.R. 91, 92 (N.D. Tex. 1988). It is important to note, however, that the estate has no greater rights to the funds than the debtor would have outside bankruptcy. *See United Parcel Service*, 794 F.2d at 1008. Similarly, a secured lender with a security interest in contract proceeds in certain circumstances would have a claim inferior to that of a subcontractor with a lien claim, particularly in a case where the construction contract provides that the debtor/contractor is not entitled to payment of contract proceeds until all lien claims and other unpaid claimants under it have been satisfied in full. *See Id.* A surety that has paid out amounts to satisfy claims of subcontractors and vendors will have priority over a secured lender under the theory of subrogation. *See United States Fidelity & Guar. Co. v. First State Bank of Salina*, 208 Kan. 738, 494 P.2d 1149 (1972).

(iii) Joint Checks

In some circumstances, payment may be made by joint check to a debtor/contractor and a subcontractor and vendor, in which event a determination must be made whether the payment is property of the estate of the debtor/contractor. Such determination depends upon the parties' intention as to whether the debtor is merely a conduit for payment. *See Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1356 (5th Cir.) *reh'g denied* 801 F.2d 398 (1986)(*en banc*). Presumably, the debtor at most may have bare legal title to the funds. That may be enough to support a turnover claim by the debtor/contractor, but if the other party to the joint check owns the

equitable interest, it is likely to ultimately prevail in recovering the proceeds.

(iv) Favorable Contract Terms and Set-Off

It is important for one holding contract proceeds (such as an owner or general contractor) to avoid liability for double payment. Protection may be found in seeking relief from the stay to set off amounts owing to the debtor/contractor against amounts the debtor/contractor owes the owner or general contractor, under terms of the contract. Routinely, the terms of the contract obligate the debtor/contractor to pay or bond around outstanding liens and claims of unpaid subcontractors and vendors. Illustrative language can be found in the 5th Circuit's discussion of the *United Parcel Service* case at 794 F.2d 1008. The party holding the proceeds should file a motion for relief from stay seeking authority to make the payments directly to claimants under the contract and to set off those amounts against contract proceeds otherwise owing by the owner or general contractor to the debtor/contractor. The Bankruptcy Act requires motions for relief from stay to be heard not later than 30 days after they are filed in a business case, or not later than 60 days after they are filed in an individual case, otherwise the automatic stay terminates, so this is an expeditious manner of getting before the court and possibly obtaining prompt approval for direct payments around the debtor/contractor. See 11 U.S.C. § 362(e). While a contractor or owner could file an adversary proceeding seeking a declaratory judgment that the remaining contract proceeds are not property of the debtor or of the estate, an adversary proceeding is a full lawsuit within the bankruptcy case and typically takes several months to reach trial and a final disposition. Consequently, it is not an efficient or

expeditious means of obtaining the desired relief.

While The Bankruptcy Act recognizes the right of a creditor to set off a claim, a party must first obtain relief from the automatic stay to do so. See *In re Appel*, 166 B.R. 624 (Bankr.S.D.Tex. 1994). Set-off requires a "mutuality" of the debt, in that both obligations in question must have arisen pre-petition. See *In re Hill*, 19 B.R. 375 (Bankr.N.D.Tex. 1982). The two claims, however, need not have arisen from the same transaction or series of transactions. In the event the funds or proceeds in question are not property of the estate, as may be the case where the debtor/contractor is obligated to pay all claims and expenses before being entitled to the contract proceeds, relief from the stay may not be necessary.

It is possible a bankruptcy court could find the debtor/contractor has at least legal title to the funds, in which event relief from the stay to conduct a set-off would be necessary. In that case, the debtor/contractor's failure to pay the claims and expenses as required under the terms of the contract creates a claim by the owner against the debtor, but certain courts have held the claim is created only as to underlying claims the owner or general contractor was obligated to pay, such as lien claims or completion costs. See *In re Flanagan Brothers, Inc.*, 47 B.R. 299 (Bankr.D.N.J. 1985); *In re Scherer Hardware & Supply, Inc.*, 9 B.R. 125 (Bankr.N.D.Ill. 1981) (set-off not allowed where suppliers paid had not perfected liens and court therefore considered payments voluntary).

(v) Recoupment

The theory of recoupment may also be available in dealing with contract proceeds. Recoupment requires both the claims by and

against the debtor have arisen out of the same transaction. *See In re Clowards, Inc.*, 42 B.R. 627, 628 (Bankr.D.Idaho 1984). The automatic stay does not bar recoupment. *See In re Visiting Nurse Ass'n of Tampa Bay, Inc.*, 121 B.R. 114 (Bankr.M.D.Fla. 1990). Several courts have held that recoupment, as distinguished from the right of set-off, may be exercised by a creditor to withhold payments due the estate without regard to the requirements applying to set-offs, including the requirements imposed by Section 362 (the automatic stay provision) of The Bankruptcy Act. *See, e.g., Hulford v. Powers*, 896 F.2d 176, 179 (5th Cir. 1990); *see also Rooster v. Raphael Roy, S.R.L.*, 127 B.R. 560, 570 (Bankr.E.D.Pa. 1991) (automatic stay does not prohibit creditor from exercising a right to recoupment). Recoupment is generally asserted as a defense to efforts by debtor to gain possession of funds.

(vi) Options for Owners or General Contractors

In many instances, an owner or general contractor will initially hold contract proceeds when advised that a contractor has filed bankruptcy, and decline to disburse the proceeds to the debtor/contractor. The debtor/contractor then may file an action seeking turnover of the proceeds as property of the estate. Certain defenses are available to the owner or general contractor holding the proceeds in response to the turnover claims. They can argue no account receivable is owing to the debtor because the contract terms agreed by the debtor have not been met. *See United Parcel Service*, 794 F.2d at 1007. They can possibly pay the subcontractor or vendor directly, even if there is no right to set-off, or no lien claim still available, if the contract clearly provides the debtor/contractor is not entitled to the proceeds until all subcontractors and suppliers have been paid.

Finally, of course the argument can be made that the debtor/contractor has no interest in the proceeds or, at best, a bare legal title interest in the proceeds because they are trust funds under various, accepted legal theories. *Id.* at 1009. Certainly, the safest course of action for a party holding proceeds is to file a motion for relief from stay seeking express authority to distribute those proceeds to downstream subcontractors and vendors. However, even absent express authority, various defenses exist for the owner or general contractor who bypasses the debtor/contractor and pays subcontractors and vendors directly.

**III.
SELECTED BANKRUPTCY
AMENDMENTS OF INTEREST
(not necessarily construction related)**

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 effectuated sweeping and far reaching changes to pre-existing bankruptcy law. Even though your practice most likely doesn't focus on bankruptcy law, it is helpful to understand some of the fundamental changes in bankruptcy law brought about by the new Act. Discussed below are just a few of the many changes made by the Act.

**(A) HOMESTEAD EXEMPTION
(11 U.S.C. § 522)**

- There is now a 730 day continuous domicile requirement in order to be eligible to claim your states property exemptions. If the debtor cannot meet the 730 day requirement for any state, the debtor may elect the exemptions of the state in which the debtor's domicile was located for 180 days immediately preceding the 730 day period prior to filing, or for a longer portion of such

180 day period preceding the 730 day period, than any other place.

- The homestead exemption value is capped at \$125,000 unless the debtor owned the property longer than 3 years, 4 months prior to the filing. The cap is lifted for debtors meeting the ownership duration requirement.

- The homestead exemption is reduced by the amount of the homestead paid for through conversion of non-exempt property into the exempt homestead during the previous ten years prior to the filing of the bankruptcy petition, if such conversion was done with the intent to hinder, delay, or defraud creditors.

(B) EXEMPTION FOR IRA

(11 U.S.C. § 522)

Previously the exemption for the IRA, if it was a “qualified plan” had no cap. Under the new Act, the exemption is capped at \$1 million.

(C) FRAUDULENT TRANSFERS

(11 U.S.C. § 548)

- The “look back” has been increased from 1 year under the old Bankruptcy Code to 2 years under The Bankruptcy Act.

- Transfers to fund self-settled trusts made within 10 years of the filing of the bankruptcy can be avoided if made to hinder, delay, and defraud creditors.

(D) THE AUTOMATIC STAY

(11 U.S.C. § 362)

Under The Bankruptcy Act there are now 28 exceptions to the automatic stay, rather than the former 13 exceptions.

- There is a new provision excepting the automatic stay from applying to acts to enforce liens against real estate if the debtor is a repetitive, bad faith filer.

- Post-petition transfers are not now automatically void as being in violation of the automatic stay.

- The automatic stay no longer prohibits proceeding with an eviction or unlawful detainer action where the creditor obtained a judgment for possession of the premises before the bankruptcy filing.

- A court may enter an *in rem* order with respect to the automatic stay of actions by a creditor secured by an interest in real property if the petition was part of a scheme to delay, hinder, and defraud creditors involving transfer of full or partial ownership interests or multiple bankruptcy filings affecting the property. Such an order, if recorded in compliance with state recording statutes, is binding on any case that would affect that property filed within two years after the order is entered.

(E) NONDISCHARGEABILITY

(11 U.S.C. § 523)

The scope of what is nondischargeable for “luxury goods or services” has been expanded. Prior to October 17, 2005, debts owed to a single creditor and totaling more than \$1,225 for luxury goods or services incurred by a debtor within 60 days before the filing, and cash advances aggregating more than \$1,225 also obtained during 60 days before the filing were nondischargeable. Under the new law, the threshold amount of \$1,225 has been reduced to \$500 for luxury goods and \$750 for cash advances, and the time period during which those debts were incurred has expanded from 60 days before the filing to 90 days. Accordingly, the “net”

has been greatly expanded to capture more consumer debts as nondischargeable.

(F) PROHIBITION AGAINST FILING
(11 U.S.C. § 727)

Previously, a debtor could not file another bankruptcy for 6 years after an earlier filing. The time period is now expanded to 8 years.

(G) INDIVIDUAL WAGES
(11 U.S.C. § 1115)

Previously, individual wages that were earned post-petition, or after the filing were not property of the estate under Chapter 11 and were subject to the control and discretion of the debtor. Under the Act, post-petition wages are now property of the estate and subject to oversight and some control by the bankruptcy court, creditors committee, etc.

(H) RECLAMATION
(11 U.S.C. § 546)

Under former law, a creditor could reclaim goods by issuing a written demand to the debtor within 10 days after receipt of the goods by the debtor, but if the 10 day period of time expired after the bankruptcy filing, then within 20 days after receipt of the goods by the debtor. The court could deny reclamation and provide the creditor an administrative priority claim instead. Under new law, the notice period has extended to 45 days after the debtor receives the goods for purposes of sending the written reclamation notice and, if no written reclamation notice is sent the creditor is still entitled to an administrative priority claim. The court no longer has statutory authority to deny actual reclamation and grant an administrative claim if proper notice is given.

(I) DISCHARGES
(11 U.S.C. § 1328)

The “super discharge” of Chapter 13, in which a debtor could actually discharge fraud, is now gone.

(J) Dismissal of Chapter 7 Case
(11 U.S.C. § 707)

- Under former law, a Chapter 7 case could be dismissed for “substantial abuse”. The threshold is now simply “abuse” to support dismissal.

- Probably the most profound change to the bankruptcy law is the “means testing” now required under Chapter 7 in order for a debtor to be eligible for Chapter 7 relief. This is strictly a financial test based upon poverty guidelines and similar standards. The objective was to prevent debtors from filing Chapter 7 and force them into Chapter 13.

(K) PREFERENCES
(11 U.S.C. § 547)

- As noted previously, under former law, a transfer was defensible if it was made in the ordinary course of business of the debtor and the transferee AND the transfer was made according to terms ordinary in the debtor’s and creditor’s industry. Now, the AND has been changed to OR, not only simplifying the defense, but perhaps making it available in as many as twice as many transactions.

- A new minimum floor of \$5,000 has been established in order for a transfer to be voidable. This is an affirmative defense, however, and does not prohibit the Trustee from suing for less.

IV. PERSPECTIVES ON THE NEW BANKRUPTCY ACT

Over a period of more than 100 years the United States has been governed by only three bodies of bankruptcy law: The Bankruptcy Act of 1898, The Bankruptcy Reform Act of 1978, and now the inaptly titled Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act"). The Act was pending before Congress for 8 years in largely the same form in which it was finally enacted. Not only was this the first bankruptcy legislation that was not crafted in large part by bankruptcy lawyers, professors and bankruptcy judges, but to the contrary, the vocal protestations and objections of these bankruptcy experts were ignored entirely. It is important to note that the opposition to the legislation over that 8 year period of time was not restricted to opposition from debtor's counsel or those with a particular philosophical orientation: the extreme nature of the proposed amendments were viewed by bankruptcy judges, law school professors and bankruptcy practitioners on both sides of the bar as ill-advised.

The perception of bankruptcy practitioners is that the lobbyists convinced Congress if the legislation were enacted, commercial entities would throw flowers at the legislators' feet: but now, Congress is shocked by the disdain with which this Act has been met. It truly appears this will be yet another example of the "law of unintended consequences". It is clear not only debtors (and largely consumer debtors) were targeted by the lobbyists with this legislation, but so were debtors' counsel. Just as doctors cause cancer, debtor's counsel cause bankruptcy filings, so Congress believed.

Prior to The Bankruptcy Act, 60% of Chapter 13 cases failed. The objective of The Bankruptcy Act is to push people into Chapter 13 and make them ineligible for Chapter 7 relief. The predictable result is that we will have an even greater number of total Chapter 13 bankruptcy failures than before.

The real "value" in the new Act is in the enhanced value of defaulted debt to credit card companies that cannot be discharged. The new law will allow harassing creditors much greater leeway to continue to pursue debtors relentlessly, causing them to pay harassing creditors before paying for health insurance and perhaps other necessities. A predictable – but unintended – consequence of this new act will likely be additional demands for subsidized or government funded healthcare and perhaps even generally, welfare programs.

The media broadly disseminated to the public many of the implications of the new bankruptcy law, before it became effective, and as a consequence, bankruptcy filings increased by a number reported to be as high as 50% in 2005, with some reported 600,000 bankruptcy filings in October, just before the effective date of the new Act.

Local Rule 4001. Relief from Automatic Stay.

(a) Motions for relief from stay:

- (1) Motions for relief from the stay must contain a certificate that the movant has conferred with opposing counsel (or, in the event of *pro se* parties, opposing parties) and been unable to reach an agreement on the requested relief. If no conference has been conducted, movant must certify the dates and times on which movant has attempted to confer.
- (2) A motion for relief from stay must include a hearing date from the judge's web page. Failure to obtain a hearing date from the judge's web page and to include the notice in BLR 4001(a)(3) is a waiver of the automatic termination of the automatic stay under 11 U.S.C. § 362(e) or 1301(d).
- (3) The motion must state immediately below the title:

This is a motion for relief from the automatic stay. If it is granted, the movant may act outside of the bankruptcy process. If you do not want the stay lifted, immediately contact the moving party to settle. If you cannot settle, you must file a response and send a copy to the moving party at least two days before the hearing. If you file your response less than 5 days before the hearing, you must send a copy of the motion by facsimile, by hand, or by electronic delivery. If you cannot settle, you must attend the hearing. Evidence may be offered at the hearing and the court may rule.

Represented parties should act through their attorney.

There will be a hearing on the matter on [date] at [time] in courtroom _____, [address].

- (4) In addition to service as required by FED.R.BANKR.P. 4001(a)(1), on the same day that it is filed, the motion must be served on debtor, debtor's attorney, parties requesting notice, parties with an interest in collateral that is the subject of the requested relief, co-debtors under 11 U.S.C. § 1301, parties who are identified as a party against whom relief is sought in the motion, and the trustee.
- (5) If the moving party schedules a hearing on a motion for relief from stay or agrees to continue the hearing to a date more than thirty (30) days after the date the motion was filed (20 days for motions to lift the co-debtor stay), the party shall be deemed to have waived the automatic termination under 11 U.S.C. § 362(e) and/or 1301(d).

- (6) All Motions to lift stay that request foreclosure on improved real property must be accompanied by documents evidencing the debt and lien perfection, and a payment history, including an explanation of transaction codes. Responses disputing the payment history must specify payments made that are not reflected in the payment history, the dates of payments, the amounts, and the mode. Evidence not accompanying the motion or response may be inadmissible in an evidentiary hearing.
 - (7) Failure of the movant to prosecute the motion at a preliminary hearing may result in dismissal of the motion for want of prosecution unless there is (i) an order continuing the hearing and waiving the 30-day requirement; (ii) a stipulation of the parties to continue the hearing and waive the 30-day requirement; or (iii) an agreed order resolving the motion that is entered prior to or is signed at the hearing.
 - (8) Motions for relief from the stay may never be combined with a request for other relief.
 - (9) In addition to other procedures applicable to motions for relief from the stay, a chapter 13 debtor must timely respond to motions for relief from the stay. A timely response includes the filing of an agreed order, a denial that conforms with FED. R. BANKR. P. 7008, a statement of non-opposition, or another accurate statement reflecting the current status of the motion. If no timely response is filed, the court may grant the motion for relief from the stay with or without a hearing, at its discretion.
 - (10) Responses should state the efforts of respondent to reach an agreement with movant and either (i) itemize each disputed issue of law or fact; or
 - (11) In any evidentiary hearing conducted on a motion for relief from the automatic stay, all counsel shall certify before the presentation of evidence (1) that good faith settlement discussions have been held or why they have not been held; (2) that all exhibits, appraisals and lists of witnesses (the debtor is presumed to be a witness and need not be identified) have been exchanged at least two days in advance of the hearing date; and (3) the anticipated length of the hearing. Exhibits must be marked in advance of the hearing and a bound, marked set of exhibits must be presented to the court at the commencement of the hearing.
- (b) Motions filed under BR 4001(b), 4001(c), or 4001(d) for the use of cash collateral, obtaining credit, or for approval of agreements on BR 4001 matters, must state immediately below the title:

This motion seeks an order that may adversely affect you. If you oppose the motion, you should immediately contact the moving party to resolve the dispute. If you and the moving party cannot agree, you must file a response and send a copy to the moving party. You must file and serve your response within 15 days of the date this was served on you. Your response must state why the motion should not be granted. If you do not file a timely response, the relief may be granted without further notice to you. If you oppose the motion and have not reached an agreement, you must attend the hearing. Unless the parties agree otherwise, the court may consider evidence at the hearing and may decide the motion at the hearing.

Represented parties should act through their attorney.

If a hearing has been set on the motion, this language must be added at the end of the notice:

There will be a hearing on this courtroom _____,
[address].

- (c) Motions to approve agreements governed by Bankruptcy Rule 4001(d) must be served:
 - (1) If the agreement is in an individual chapter 7 case or a chapter 13 case and concerns consumer goods, the debtor's homestead or a non-business-use vehicle, notice should be given to the chapter 13 trustee, the debtor, any co-obligor, and any party with an interest in the collateral.
 - (2) Motions to approve all other agreements governed by Bankruptcy Rule 4001(d) shall be served under BLR 2002(a)(3).
- (d) Attorneys' fees will be awarded to creditors for filing motions for relief from the stay as follows:
 - (1) Undersecured creditors will not be awarded attorneys' fees for the filing of a motion for relief from the stay in a chapter 13 bankruptcy case.

- (2) With respect to motions by oversecured creditors or by home lenders filing post-confirmation motions governed by § 1322(b)(2), the court will approve agreed orders (i) providing for attorneys' fees and costs not to exceed \$500.00 plus statutory filing fees; and (ii) providing for attorneys' fees and costs exceeding that sum only upon a submission of fee statements reflecting actual time incurred. All requests for attorneys' fees must (i) include a certification that the amount requested is less than or equal to the amount that will be paid by the holder of the lien to the holder's counsel; and (ii) be reasonable under the facts and circumstances.
 - (3) Attorneys' fees in matters not resolved by agreed orders will be considered on an evidentiary basis.
- (e) In each chapter 13 case, the Court will issue an order that authorizes the use of estate vehicles under § 363 and provides adequate protection to the holders of liens on the vehicles.
- (1) The adequate protection order will require the debtor to (i) maintain insurance on the vehicle in the amount required by the debtor(s) pre-petition contract; (ii) provide proof of insurance to the lien holder; and (iii) enter into a wage order or EFT Order not later than the date of the § 341 meeting of creditors.
 - (2) As additional adequate protection, the lien holder will be given an administrative claim, with priority under § 507(b), in an amount equal to 1.5% of the value of the vehicle for each 30 days that elapses from the date of the adequate protection order. For example, if the vehicle is valued at \$10,000, a § 507(b) adequate protection claim in the amount of \$150 will accrue each month. In the event of a dismissal or conversion of the chapter 13 case, the trustee will distribute the proceeds in accordance with § 1326(a)(2). This will result, in most cases, in payments being made in the following order of priority:
 - (A) First, to the vehicle lien holders in the amount of the adequate protection reserve;
 - (B) Second, to debtor's counsel for unpaid fees for which an application is filed on or before 20 days after entry of the order of dismissal and that have been allowed by court order;
 - (C) Third, to the debtor (directly and not through counsel).

- (D) Payments under paragraph “1” shall be made following the expiration of 10 days of entry of the dismissal order, unless the dismissal order is stayed.
- (3) The debtor or any other party in interest may object to the adequate protection order not later than 10 days after entry of the court’s order. The objecting party must state the date that the hearing will be conducted, which date will be the next chapter 13 panel after the expiration of 15 days from the date of the objection. The objection must be served on the debtor, the debtor’s counsel, the chapter 13 trustee, and any party holding security interest in the vehicle. The objecting party must attend the hearing and present evidence in support of the objection.
- (4) For purposes of valuation, the vehicle value will be determined as of the date of the filing of the chapter 13 petition. In determining the principal amount due to the lien holder under the plan, the § 507(b) payments will be (i) deducted from the value of the vehicle, if the value of the vehicle is less than the lien, resulting in a Confirmation Date Value; and (ii) applied to interest if the value of the vehicle is greater than the lien. If the value of the vehicle is less than the lien, interest will begin to accrue on the confirmation date based on the Confirmation Date Value.
- (5) The adequate protection order will not provide protection to a vehicle lender if the debtor voluntarily surrenders the vehicle by delivering the vehicle to the vehicle lender within 30 days of the petition date.
- (f) Motions for relief from the automatic stay that pertain to exempt residences or exempt vehicles (“Consumer Lift Stay Motions”) are governed by this BLR 4001(f).
 - (1) Parties who file motions for relief from the stay on exempt residences or exempt vehicles in chapter 7 and chapter 13 cases must comply with this BLR 4001(f) and must use the forms promulgated by the court from time to time.
 - (2) Variance from this rule is allowed, if exceptional circumstances exist.
 - (A) Exceptional circumstances include:
 - (1) A motion for relief from the stay filed against a repeat bankruptcy case filer for which the movant seeks relief other than a routine termination of the stay; or

- (2) A motion for relief from the stay on which there are disputes regarding the extent, validity, or priority of liens on the collateral that is the subject of the motion.
 - (B) A party believing that there are other exceptional circumstances justifying exemption from this rule must allege the exceptional circumstances with particularity in the motion.
- (3) Variance from this rule is allowed, if exceptional circumstances exist. When exceptional circumstances are alleged, the court may conduct an evidentiary hearing at which time the exceptional circumstances must be demonstrated by a preponderance of the evidence.
- (4) Prior to filing a Consumer Lift Stay Motion, the movant must attempt to contact the debtor(s)' counsel to discuss whether an agreement can be reached utilizing the court's agreed order forms. If such an agreement can be reached, the parties may submit a Motion for Entry of Agreed Order under FRBP 4001. Submission of an order under such circumstances avoids the expense of preparing a motion for relief, the filing fee for a motion for relief, the expense of filing a response to the motion, and the expense of attending a hearing. Conferences may be attempted by telephone or by e-mail. If no response is received within 2 business days, the motion may be filed without an actual conference. In all conferences, movant's counsel must provide a contact person with a direct telephone number for future discussions.
- (5) If the parties cannot reach agreement to submit an agreed order in the court's format, the party seeking relief from the stay may file a Consumer Lift Stay Motion in the court's format along with a proposed order, also in the court's format. Responses by the debtor must be one of the following and must be filed at least five days before the hearing:
- (A) Submission of an agreed order terminating the stay utilizing a form from the court's website. If an agreed order is filed in accordance with these procedures, the court usually will issue the order prior to the hearing. Attendance at the originally scheduled hearing is not necessary, by either party. If the court declines to issue the order, the court will issue an order for further proceedings.
 - (B) Submission of an agreed order conditioning the stay utilizing a form from the court's website. If an agreed order is filed in accordance with these procedures, the court will usually issue the order prior to the hearing. Attendance at the originally scheduled hearing is not

necessary, by either party. If the court declines to issue the order, the court will issue an order for further proceedings.

- (C) Filing an answer or other response. Answers must comply with FRBP 9011. Responses must be based on reasonable investigation and must not be filed for delay or other improper purpose. A response stating that the debtor(s)' attorney has not been able to contact the debtor(s) or a general denial not based on reasonable investigation may not be sufficient to prevent default relief. If a timely response is filed, attendance at the hearing by both parties is required.

- (6) If a sufficient response has not been timely filed, the movant must submit a proposed form of default order with a certification of default. The proposed form of default order and certification must comply with the court's form as promulgated from time to time. The court may issue a default order if an adequate response is not filed at least five days before the hearing. If the court issues a default order prior to the hearing, counsel need not appear at the hearing. If the court has not issued a default order and a party who has failed to respond appears at the hearing, the court may nevertheless grant default relief or may set a date for an evidentiary hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: §
[DEBTOR] §
§ C.A. NO. [CASE NUMBER]
§ (Chapter ___)
Debtor. §

**NOTICE OF APPEARANCE, REQUEST FOR ALL NOTICES,
AND DEMAND FOR SERVICE OF PAPERS**

PLEASE TAKE NOTICE that [FIRM OR INDIVIDUAL NAME] appears on behalf of [CREDITOR] and hereby submits this notice of appearance in the above-captioned proceeding and requests notice of all hearings and conferences herein and makes a demand for service of all papers herein, including papers and notices pursuant to Bankruptcy Rules 2002, 3017, 9007 and 9010 and §§ 342 and 1009(b) (if applicable) of the Bankruptcy Code. All notices given or required to be given in this case shall be given to and served upon CBY at the following address:

Craig E. Power
Cokinos, Bosien & Young
2919 Allen Parkway, Suite 1500
Houston, Texas 77019

PLEASE TAKE FURTHER NOTICE that the foregoing demand includes not only the notices and papers referred to in the Bankruptcy Rules and sections of the Bankruptcy Code specified above, but also includes, without limitation, the schedules, statement of financial affairs, operating reports, any plan of reorganization or disclosure statement, any letter, application, motion, complaint, objection, claim, demand, hearing, petition, pleadings or request, whether formal or informal, whether written or oral, and whether transmitted or conveyed by mail,

delivery, telephone, telegraph, telex or otherwise filed with or delivered to the Bankruptcy Clerk, Court or Judge (as those terms are defined in Bankruptcy Rule 9001) in connection with and with regard to the above-referenced bankruptcy case and any proceedings related thereto.

PLEASE TAKE FURTHER NOTICE that [CREDITOR] intends that neither this Notice of Appearance nor any later appearance, pleading, claim or suit shall waive (i) the right of [CREDITOR] to have final orders in non-core matters entered only after *de novo* review by a District Judge; (ii) the right of [CREDITOR] to trial by jury in any proceedings so triable in these cases or any case, controversy or proceeding related to these cases; (iii) the right of [CREDITOR] to have the District Court withdraw the reference in any matter subject to mandatory or discretionary withdrawal; or (iv) any other rights, claims, actions, defenses, setoffs, or recoupments to which [CREDITOR] is or may be entitled under agreements, at law, in equity, or otherwise, all of which rights, claims, actions, defenses, setoff, and recoupments the undersigned expressly reserves on behalf of [CREDITOR].

Respectfully submitted,

ATTORNEY NAME
Bar No. 00000000
Admissions No. 0000
123 Anywhere Street
Somewhere, Texas 55555
(713)5555-5000
Fax (713)555-5555

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Notice of Appearance and Request for Service of Papers were mailed on [DATE] by United States First Class Mail and/or by Certified Mail, Return Receipt Requested, to the Debtor, Debtor's counsel, Chapter ____ Trustee, U.S. Trustee, and all parties as listed on the attached Service List.

ATTORNEY NAME

Local Rule 4001. Relief from Automatic Stay.

(a) Motions for relief from stay:

- (1) Motions for relief from the stay must contain a certificate that the movant has conferred with opposing counsel (or, in the event of *pro se* parties, opposing parties) and been unable to reach an agreement on the requested relief. If no conference has been conducted, movant must certify the dates and times on which movant has attempted to confer.
- (2) A motion for relief from stay must include a hearing date from the judge's web page. Failure to obtain a hearing date from the judge's web page and to include the notice in BLR 4001(a)(3) is a waiver of the automatic termination of the automatic stay under 11 U.S.C. § 362(e) or 1301(d).
- (3) The motion must state immediately below the title:

This is a motion for relief from the automatic stay. If it is granted, the movant may act outside of the bankruptcy process. If you do not want the stay lifted, immediately contact the moving party to settle. If you cannot settle, you must file a response and send a copy to the moving party at least two days before the hearing. If you file your response less than 5 days before the hearing, you must send a copy of the motion by facsimile, by hand, or by electronic delivery. If you cannot settle, you must attend the hearing. Evidence may be offered at the hearing and the court may rule.

Represented parties should act through their attorney.

There will be a hearing on the matter on [date] at [time] in courtroom _____, [address].

- (4) In addition to service as required by FED.R.BANKR.P. 4001(a)(1), on the same day that it is filed, the motion must be served on debtor, debtor's attorney, parties requesting notice, parties with an interest in collateral that is the subject of the requested relief, co-debtors under 11 U.S.C. § 1301, parties who are identified as a party against whom relief is sought in the motion, and the trustee.
- (5) If the moving party schedules a hearing on a motion for relief from stay or agrees to continue the hearing to a date more than thirty (30) days after the date the motion was filed (20 days for motions to lift the co-debtor stay), the party shall be deemed to have waived the automatic termination under 11 U.S.C. § 362(e) and/or 1301(d).

- (6) All Motions to lift stay that request foreclosure on improved real property must be accompanied by documents evidencing the debt and lien perfection, and a payment history, including an explanation of transaction codes. Responses disputing the payment history must specify payments made that are not reflected in the payment history, the dates of payments, the amounts, and the mode. Evidence not accompanying the motion or response may be inadmissible in an evidentiary hearing.
 - (7) Failure of the movant to prosecute the motion at a preliminary hearing may result in dismissal of the motion for want of prosecution unless there is (i) an order continuing the hearing and waiving the 30-day requirement; (ii) a stipulation of the parties to continue the hearing and waive the 30-day requirement; or (iii) an agreed order resolving the motion that is entered prior to or is signed at the hearing.
 - (8) Motions for relief from the stay may never be combined with a request for other relief.
 - (9) In addition to other procedures applicable to motions for relief from the stay, a chapter 13 debtor must timely respond to motions for relief from the stay. A timely response includes the filing of an agreed order, a denial that conforms with FED. R. BANKR. P. 7008, a statement of non-opposition, or another accurate statement reflecting the current status of the motion. If no timely response is filed, the court may grant the motion for relief from the stay with or without a hearing, at its discretion.
 - (10) Responses should state the efforts of respondent to reach an agreement with movant and either (i) itemize each disputed issue of law or fact; or
 - (11) In any evidentiary hearing conducted on a motion for relief from the automatic stay, all counsel shall certify before the presentation of evidence (1) that good faith settlement discussions have been held or why they have not been held; (2) that all exhibits, appraisals and lists of witnesses (the debtor is presumed to be a witness and need not be identified) have been exchanged at least two days in advance of the hearing date; and (3) the anticipated length of the hearing. Exhibits must be marked in advance of the hearing and a bound, marked set of exhibits must be presented to the court at the commencement of the hearing.
- (b) Motions filed under BR 4001(b), 4001(c), or 4001(d) for the use of cash collateral, obtaining credit, or for approval of agreements on BR 4001 matters, must state immediately below the title:

This motion seeks an order that may adversely affect you. If you oppose the motion, you should immediately contact the moving party to resolve the dispute. If you and the moving party cannot agree, you must file a response and send a copy to the moving party. You must file and serve your response within 15 days of the date this was served on you. Your response must state why the motion should not be granted. If you do not file a timely response, the relief may be granted without further notice to you. If you oppose the motion and have not reached an agreement, you must attend the hearing. Unless the parties agree otherwise, the court may consider evidence at the hearing and may decide the motion at the hearing.

Represented parties should act through their attorney.

If a hearing has been set on the motion, this language must be added at the end of the notice:

There will be a hearing on this courtroom _____,
[address].

- (c) Motions to approve agreements governed by Bankruptcy Rule 4001(d) must be served:
 - (1) If the agreement is in an individual chapter 7 case or a chapter 13 case and concerns consumer goods, the debtor's homestead or a non-business-use vehicle, notice should be given to the chapter 13 trustee, the debtor, any co-obligor, and any party with an interest in the collateral.
 - (2) Motions to approve all other agreements governed by Bankruptcy Rule 4001(d) shall be served under BLR 2002(a)(3).
- (d) Attorneys' fees will be awarded to creditors for filing motions for relief from the stay as follows:
 - (1) Undersecured creditors will not be awarded attorneys' fees for the filing of a motion for relief from the stay in a chapter 13 bankruptcy case.

- (2) With respect to motions by oversecured creditors or by home lenders filing post-confirmation motions governed by § 1322(b)(2), the court will approve agreed orders (i) providing for attorneys' fees and costs not to exceed \$500.00 plus statutory filing fees; and (ii) providing for attorneys' fees and costs exceeding that sum only upon a submission of fee statements reflecting actual time incurred. All requests for attorneys' fees must (i) include a certification that the amount requested is less than or equal to the amount that will be paid by the holder of the lien to the holder's counsel; and (ii) be reasonable under the facts and circumstances.
 - (3) Attorneys' fees in matters not resolved by agreed orders will be considered on an evidentiary basis.
- (e) In each chapter 13 case, the Court will issue an order that authorizes the use of estate vehicles under § 363 and provides adequate protection to the holders of liens on the vehicles.
- (1) The adequate protection order will require the debtor to (i) maintain insurance on the vehicle in the amount required by the debtor(s) pre-petition contract; (ii) provide proof of insurance to the lien holder; and (iii) enter into a wage order or EFT Order not later than the date of the § 341 meeting of creditors.
 - (2) As additional adequate protection, the lien holder will be given an administrative claim, with priority under § 507(b), in an amount equal to 1.5% of the value of the vehicle for each 30 days that elapses from the date of the adequate protection order. For example, if the vehicle is valued at \$10,000, a § 507(b) adequate protection claim in the amount of \$150 will accrue each month. In the event of a dismissal or conversion of the chapter 13 case, the trustee will distribute the proceeds in accordance with § 1326(a)(2). This will result, in most cases, in payments being made in the following order of priority:
 - (A) First, to the vehicle lien holders in the amount of the adequate protection reserve;
 - (B) Second, to debtor's counsel for unpaid fees for which an application is filed on or before 20 days after entry of the order of dismissal and that have been allowed by court order;
 - (C) Third, to the debtor (directly and not through counsel).

- (D) Payments under paragraph “1” shall be made following the expiration of 10 days of entry of the dismissal order, unless the dismissal order is stayed.
- (3) The debtor or any other party in interest may object to the adequate protection order not later than 10 days after entry of the court’s order. The objecting party must state the date that the hearing will be conducted, which date will be the next chapter 13 panel after the expiration of 15 days from the date of the objection. The objection must be served on the debtor, the debtor’s counsel, the chapter 13 trustee, and any party holding security interest in the vehicle. The objecting party must attend the hearing and present evidence in support of the objection.
- (4) For purposes of valuation, the vehicle value will be determined as of the date of the filing of the chapter 13 petition. In determining the principal amount due to the lien holder under the plan, the § 507(b) payments will be (i) deducted from the value of the vehicle, if the value of the vehicle is less than the lien, resulting in a Confirmation Date Value; and (ii) applied to interest if the value of the vehicle is greater than the lien. If the value of the vehicle is less than the lien, interest will begin to accrue on the confirmation date based on the Confirmation Date Value.
- (5) The adequate protection order will not provide protection to a vehicle lender if the debtor voluntarily surrenders the vehicle by delivering the vehicle to the vehicle lender within 30 days of the petition date.
- (f) Motions for relief from the automatic stay that pertain to exempt residences or exempt vehicles (“Consumer Lift Stay Motions”) are governed by this BLR 4001(f).
 - (1) Parties who file motions for relief from the stay on exempt residences or exempt vehicles in chapter 7 and chapter 13 cases must comply with this BLR 4001(f) and must use the forms promulgated by the court from time to time.
 - (2) Variance from this rule is allowed, if exceptional circumstances exist.
 - (A) Exceptional circumstances include:
 - (1) A motion for relief from the stay filed against a repeat bankruptcy case filer for which the movant seeks relief other than a routine termination of the stay; or

- (2) A motion for relief from the stay on which there are disputes regarding the extent, validity, or priority of liens on the collateral that is the subject of the motion.
 - (B) A party believing that there are other exceptional circumstances justifying exemption from this rule must allege the exceptional circumstances with particularity in the motion.
- (3) Variance from this rule is allowed, if exceptional circumstances exist. When exceptional circumstances are alleged, the court may conduct an evidentiary hearing at which time the exceptional circumstances must be demonstrated by a preponderance of the evidence.
- (4) Prior to filing a Consumer Lift Stay Motion, the movant must attempt to contact the debtor(s)' counsel to discuss whether an agreement can be reached utilizing the court's agreed order forms. If such an agreement can be reached, the parties may submit a Motion for Entry of Agreed Order under FRBP 4001. Submission of an order under such circumstances avoids the expense of preparing a motion for relief, the filing fee for a motion for relief, the expense of filing a response to the motion, and the expense of attending a hearing. Conferences may be attempted by telephone or by e-mail. If no response is received within 2 business days, the motion may be filed without an actual conference. In all conferences, movant's counsel must provide a contact person with a direct telephone number for future discussions.
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: §
[DEBTOR] §
§ C.A. NO. [CASE NUMBER]
§ (Chapter ___)
Debtor. §

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AND DEMAND FOR SERVICE OF PAPERS**

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Respectfully submitted,

ATTORNEY NAME
Bar No. 00000000
Admissions No. 0000
123 Anywhere Street
Somewhere, Texas 55555
(713)5555-5000
Fax (713)555-5555

CERTIFICATE OF SERVICE

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ATTORNEY NAME